National Railroad Passenger Corporation v. Morgan

Oral Argument - January 09, 2002

William H. Rehnquist

We'll hear argument next in No. 00-1614, the National Railroad Passenger Corporation v. Abner Morgan.

Mr. Englert.

Roy T. Englert, Jr.

Thank you, Mr. Chief Justice, and may it please the Court: 25 years ago in United Air Lines v. Evans, this Court observed that an employer was entitled to treat a past act as lawful after respondent failed to file a timely charge of discrimination.

In the Court's words... and I quote... a discriminatory act, which has not made the basis for a timely charge, is the legal equivalent of a discriminatory act which occurred before the statute was passed.

The Court further referred to the alleged discriminatory act outside the limitations period as merely an unfortunate event in history which has no present legal consequences.

In the present case, Abner Morgan challenges as discriminatory various acts that he did not make the basis for an EEOC charge within 300 days.

Our contention is that Amtrak was entitled to treat those past acts as lawful after the passage of 300 days.

Those acts are merely unfortunate events in history with no present legal consequences.

The Ninth Circuit saw things quite differently.

According to the Ninth Circuit, all plaintiffs, completely without regard to their own diligence, may base suit on events they didn't make the basis of a timely charge, as long as those events are sufficiently related to later events that can

also be characterized as discrimination.

Sandra Day O'Connor

Well, Mr. Englert, there are, I assume even in your view, a few exceptions to this rule.

When is it that you would look back?

Roy T. Englert, Jr.

For certain diligent plaintiffs--

Sandra Day O'Connor

Yes.

Roy T. Englert, Jr.

--who bring suit within 300 days after their cause of action first accrues, we would look back.

That obviously isn't this case.

Sandra Day O'Connor

And there's no other circumstance, you think, where you would end up looking back beyond... where the... the full thrust of... of what was going on didn't become evident until the statute had passed as some early... on some earlier events?

Roy T. Englert, Jr.

We would allow plaintiffs, in exactly the situation you described, Justice O'Connor, to look back, the situation in which it was not fully evident until within the 300-day period what was going on.

That is the exception we're willing to concede.

Stephen G. Breyer

I don't understand how's that's an exception.

I thought we were talking about the period before the 300 days.

Is there any instance in which you would allow a person to get recovery for something that happened to him prior to 300 days before he filed?

Roy T. Englert, Jr.

Yes, Justice Breyer.

If the--

Stephen G. Breyer

What is that?

Roy T. Englert, Jr.

--if the events outside the 300-day window were not sufficiently severe or pervasive to rise to the level of being actionable, then we would concede that the cause of action doesn't accrue until they've become sufficiently severe or pervasive.

Stephen G. Breyer

What about the circumstance where they're very much related to what did occur within the 300 days, but the person isn't certain?

I mean, later on the judge says, yes, it was independently actionable, but I could understand how a person at the time might think it wasn't.

What about that one?

Roy T. Englert, Jr.

Well, there may be close cases, Justice Breyer, and--

Stephen G. Breyer

No, no.

But I want to know.

This... that is the case.

A judge would say a reasonable person would not have realized, though he would have been wrong, that those outside-the-period events rose to the level of giving him a cause of action.

How would you decide that case?

Roy T. Englert, Jr.

--We... we would give away that case.

Stephen G. Breyer

Okay.

Roy T. Englert, Jr.

If a reasonable person would not have known--

Stephen G. Breyer

Fine.

Antonin Scalia

Would not have known his injury.

So... so you're saying the test under the act is not injury, but knowledge of injury.

Roy T. Englert, Jr.

--Well, Justice Scalia, that gets into the debate, of course, this Court has had--

Antonin Scalia

I know it does.

You're... you're giving it away.

You're saying that under the act, knowledge of injury is--

Roy T. Englert, Jr.

--No.

I... I'm not trying to give that away.

I'm trying not to take a position on that.

I understood Justice Breyer's question to pertain to the situation in which the judge says a reasonable person would not have known, not this particular plaintiff wouldn't have known, but a reasonable person would not have known.

Antonin Scalia

--Oh, in practice, that's always an exception to the knowledge of injury rule.

With due diligence, he didn't know.

I mean, but... but that... you're willing to accept that.

Roy T. Englert, Jr.

That's why I'm not trying to give away anything on injury versus injury discovery.

Antonin Scalia

With due diligence... with due diligence... the person had due diligence but didn't know.

So, it's a... it's a knowledge... it's a knowledge of injury test.

William H. Rehnquist

Not a subjective knowledge of injury but knowledge of injury that... that would have occurred to a reasonable person.

Roy T. Englert, Jr.

Exactly, Mr. Chief Justice, and--

Stephen G. Breyer

All right.

If you're willing to give that one away, what about a person who, though he might have understood... a reasonable person might have understood that this would have been actionable, he's in the middle of negotiations with his company

there... there, and it would have been foolish to go to the EEOC.

Roy T. Englert, Jr.

--That plaintiff loses.

Stephen G. Breyer

I mean, because after all, we're trying to settle this thing right within the company.

Roy T. Englert, Jr.

That plaintiff loses, Justice Breyer.

That's quite clear.

Stephen G. Breyer

He loses.

Roy T. Englert, Jr.

That's quite clear under cases like Robinson Meyers.

Stephen G. Breyer

And... and why should he lose where the other one doesn't?

Roy T. Englert, Jr.

Because this Court has said so.

Cases like Robinson Meyers and Johnson v.--

Stephen G. Breyer

Are you talking about EEOC cases?

Roy T. Englert, Jr.

--Those... those are title VII cases in which... Robinson Meyers was a case in

which the plaintiff exhausted union grievances and then filed the EEOC charge, and the Court said, no, you should have filed your EEOC charge within the statutory period.

Ruth Bader Ginsburg

Mr. Englert, I'm not aware that there is a case... perhaps I'm wrong about this... quite like this where there are a succession of similar acts, a number of disciplines, a number of refusal to give training opportunities, and the employee goes to the EEO... the in-house person, tries to settle it, tries not to make a Federal case out of it.

And... but the rule that you would have us adopt would say if you're in doubt, sue instead of saying, if you're in doubt... each one of these discrete instances that he was trying to work out, we would have to have... your rule would mean that this person has to file 10 charges with the EEOC instead of one.

Roy T. Englert, Jr.

Well, it's not when in doubt, sue, Justice Ginsburg.

It is when in doubt, go to the EEOC, and it's an important distinction because the purpose of filing with the EEOC is to start a conciliatory process.

Ruth Bader Ginsburg

But he's always... he also has the in-house.

He's got a conciliatory process going without involving the Federal Government.

He's just dealing with his employer.

His employer has an EEO counselor.

That he did.

He didn't come to a Federal agency.

So, let's take it that we're talking about the EEOC and not suing in court.

The EEOC... one of its objections is you would be breeding tremendous fragmentation here because on every incident in a pattern, he'd have to file another EEOC charge.

That much you are saying.

Roy T. Englert, Jr.

That much I am saying, and that is very consistent with the purposes of the title VII charge-filing requirement, which is to cause plaintiffs to go promptly to the EEOC, as this Court itself has said in a number of its cases, and to get that process started quickly.

Now, there... there could be rare cases, Justice Ginsburg, in which equitable tolling would apply on the facts that you've suggested.

This isn't one of them, and I don't think there are many such cases.

But if one is in the middle of some kind of negotiation and is being misled into thinking that it's all going to work out and therefore don't got to the EEOC, that person might have an equitable tolling argument, although as this Court has said, the virtue of equitable tolling is that it is so rarely invoked--

Antonin Scalia

Well, I guess any statute of limitations of any sort means you... you have to sue 10 times instead of one time, doesn't it?

Roy T. Englert, Jr.

--Yes.

Antonin Scalia

I mean, it's the nature of a statute of limitations that when you're hurt, you have to sue.

You can't wait till you're hurt the 10th time and then say, well, you know, let's put it in one big package.

I'll wait 10 years until I'm hurt... hurt more often.

Roy T. Englert, Jr.

Yes, Justice Scalia, and--

Ruth Bader Ginsburg

Mr. Englert, I don't think that this is in any case.

I think you have recognized that in the so-called hostile atmosphere case, the

first epithet, even the second, it's... it's uncertain when how much is enough and when it's insufficient.

So, I think you recognize that at least in that category of case, there would have to be a succession of similar incidents.

Roy T. Englert, Jr.

--Yes.

That's part of the definition of the very violation of title VII in hostile environment cases.

Stephen G. Breyer

In other words, you're... you're saying that there is no pervasive hostility, no pervasive hostile environment until the acts are repeated, or is it there is a pervasive hostile environment, but it's just not discovered until the acts are repeated?

Which... which of the two is it?

Roy T. Englert, Jr.

The case I'm willing to concede, looking back beyond 300 days, is the case in which there is no hostile environment until within the 300-day period.

The fact that the hostile environment isn't discovered I have not conceded.

That... that case I have not conceded.

Antonin Scalia

Wait.

Now, you say there is no hostile... what are you conceding?

That that... that that evidence can be brought in, or that you can get damages for those events?

Roy T. Englert, Jr.

I'm conceding that you can get back pay or damages for those events as the Seventh Circuit said in Galloway and as the First Circuit said in Sabree.

Antonin Scalia

Well, why if... if you assert that there hasn't been any offense when those events occurred?

You say there's not yet a hostile environment.

Why should you be able to get any damages for a period during which there as not a hostile environment?

Roy T. Englert, Jr.

Well, the hypothetical example, Justice Scalia, that I think makes the point is suppose there is an epithet at the office Christmas party one year.

Then there's an epithet at the office Christmas party the next year.

Then there's an epithet at the office Christmas party the third year, and the person has to seek psychological counseling after each of those.

It's not going to rise to the level, in all likelihood, of a hostile environment after one epithet, but with repetition, it can rise to the level of a hostile environment.

Antonin Scalia

Well, sure, but it doesn't make the first one a hostile environment.

Roy T. Englert, Jr.

No, but the statute of limitations, under standard accrual principles, didn't begin to run until it became a hostile environment, and we're suggesting--

David H. Souter

But if that's the case, you don't have to concede anything because the hostile environment doesn't occur, as you're analyzing it, until... within the 300-day period.

I thought what you meant was that you would concede the... the case... you would concede the application of continuing violation when the hostile environment was not apparent enough to bring a lawsuit until you get within the 300-day period... yes, the... the limitation period.

Roy T. Englert, Jr.

--Yes.

David H. Souter

Okay.

But you're saying that... I... I thought, in answer to Justice Scalia, you were saying there is no hostile environment prior to the third incident, which is within the period.

Roy T. Englert, Jr.

No, I--

David H. Souter

Maybe that isn't what you meant.

Roy T. Englert, Jr.

--I think--

David H. Souter

That's how I understood him.

Roy T. Englert, Jr.

--Justice Souter... and I don't know that I want to spend much more of my argument on concessions, but-- [Laughter] --I think the... the point is that the entire series of actions that constitute the hostile environment are all part of the hostile environment, but it may not--

David H. Souter

Okay.

Then the hostile environment goes back beyond the 300-day period.

You're saying a hostile environment began with the first epithet, but you didn't have a... a sufficiently obvious indication of it until you got to epithet three.

Roy T. Englert, Jr.

--In 20/20 hindsight, this is how hostile environment cases work.

An epithet that was not a hostile environment on day 1 may actually become part of a hostile environment on day 300.

Antonin Scalia

Good.

Then change your answer to my earlier question because I asked you whether there was a hostile environment at the first incident... incident, and you said no, it... there was not yet until the last incident.

You're talking about a different situation where there's been a hostile environment all along, but it doesn't become apparent until the third incident, but there really was one the first time the epithet was used.

That's a different situation, and we got to know which one of the two you... you want us to allow.

Stephen G. Breyer

And that was my... and that was my question.

And I want to know which one you think this case is, and I also want to know can there be both kinds of cases and we have to see which applies... which description applies in each instance.

Roy T. Englert, Jr.

Okay.

In... in this case, Mr. Morgan was complaining to members of Congress starting in 1991.

There is absolutely no doubt that he thought that he was being discriminated against from long before the statute of limitations ran.

Sandra Day O'Connor

Is this a hostile environment claim, do you think?

Roy T. Englert, Jr.

Not primarily, but there is a hostile environment claim in this case as the Ninth Circuit saw it.

Sandra Day O'Connor

It is in the case.

Is it a pattern and practice case?

Roy T. Englert, Jr.

No, Your Honor.

Pattern or practice is a term in section 707 of the act, which applies exclusively to governmental actions, and the Court has used that phrase in certain class actions as well... in private class actions, but this is not a class action either.

Sandra Day O'Connor

But it could be a hostile environment claim included here.

Roy T. Englert, Jr.

The Ninth Circuit believed there was, yes.

But in any event, Mr. Morgan was... was well aware long before he filed his EEOC charge that he had a... a claim of discrimination.

I--

John Paul Stevens

May I ask you about a hypothetical that's perhaps a little simpler to discuss?

Supposing the company had a policy that was unwritten or secret or something like that, we will not allow any woman into a certain job category, no woman, no black into a certain job category.

It's... it's found out 3 years after the policy was formally described and so forth.

And then a person who repeatedly tried to get into that job category over the entire 3-year period but was refused each time because of the existence of a continuing policy, does that person have any right to recover for anything

happening prior to the 300 days?

Roy T. Englert, Jr.

--I think not, Justice Stevens, but that raises two issues that are not in this case.

One is fraudulent concealment, and the second is the issue of injury versus injury discovery for statutes of limitation--

John Paul Stevens

I'm assuming there's no discovery, but I'm assuming--

Roy T. Englert, Jr.

--No.

John Paul Stevens

--if you can ever describe anything as a continuing violation, I have described a continuing discriminatory policy.

And if it's clear as a bell that it's all one policy and it had a several... manifested itself in several different incidents, is it... may a plaintiff recover for something that happened prior to the 300-day filing?

That's my... sort of the basic question in this case it seems to me.

Roy T. Englert, Jr.

My short answer is no.

John Paul Stevens

Okay.

Roy T. Englert, Jr.

My longer answer is no unless this Court resolves an issue that is not presented by this case which is injury versus injury discovery in favor of an injury discovery rule.

John Paul Stevens

You're saying injury would not be enough.

Roy T. Englert, Jr.

That issue is not in this case, but that is my... I'm saying injury would be enough.

John Paul Stevens

Well, arguably it would be in this case to the extent the hostile environment claim is a continuing violation.

I don't know whether it is, but arguably that's... the hostile environment claim conceivably could be a continuing policy also.

Roy T. Englert, Jr.

It could be, but the reason I'm making a concession with regard to hostile environment claims is not injury versus injury discovery.

The reason I'm making a concession is because under standard principles of accrual, the plaintiff may not sue until he or she actually has a cause of action.

And because a hostile environment claim can only develop over time, it may be that not until the third, fourth, fifth epithet, incident is... is there anything for the plaintiff to sue on.

John Paul Stevens

Well, my assumption is a case... there was a violation all along, but the... the charge was not filed within 300 days of the commencement of a continuing violation.

The question I have in the back of my mind is, could there be recovery for the portion of the continuing violation that was more than 300 days old?

Roy T. Englert, Jr.

There... no.

There can always be recovery for the portion of the continuing violation within the 300 days.

Ruth Bader Ginsburg

Mr. Englert, you have been deflected from what I think is the strongest point on the other side that said, that's all well and good, but Congress understood you could go back way beyond the 300 days because they put a 2-year cap on back pay.

Roy T. Englert, Jr.

Yes.

Ruth Bader Ginsburg

So, that shows how, whatever you might say, just looking at the words of the statute, Congress understood that you have to shorten the period and the period they picked was 2 years, much longer than 180 days or 300.

Roy T. Englert, Jr.

And let me try very quickly to say why that argument is not a good argument.

Congress did worry that there was no time limit on title VII actions and it put the 2 years in there.

But that's because of the continuing effects doctrine, which this Court repudiated in 1977, and that's because this Court hadn't clearly said the title VII statute of limitations is section 706(e) until 1982 in Zipes.

Many of the lower courts were actually borrowing State statutes of limitations on the theory that title VII had no statute of limitations of its own.

This Court laid that to rest in Zipes, and now all of the Federal courts of appeals, including the Ninth Circuit, agree that 706(e) is a statute of limitations.

If I may, I'd like to reserve the balance of my time.

William H. Rehnquist

Very well, Mr. Englert.

Mr. Schlick, we'll hear from you.

Austin C. Schlick

Mr. Chief Justice, and may it please the Court: This Court's decision in Zipes established and the Court reaffirmed in Lorance that section 706(e) operates as a statute of limitations.

The limitations period begins to run with the occurrence of the alleged unlawful employment practice.

In this case, respondent could sue on alleged violations that occurred not more than 300 days before he filed his charge with EEOC, but he could not sue on alleged violations that occurred earlier and outside the limitations period.

Our construction of section 706(e) gives effect to the balance underlying that provision.

On the one hand, it ensures that plaintiffs are able to sue and recover for ongoing violations.

At the same time, it ensures that employers will not be liable for violations that... that occurred long ago.

John Paul Stevens

When you say ongoing violations and taking my hypothetical, could they recover for damages prior to the 300 days?

Austin C. Schlick

In your hypothetical, Justice Stevens, recovery would only be available if equitable tolling came into play.

As... absent equitable tolling based on... based on the conceal... equitable estoppel based on the concealment that you mentioned in your hypothetical, recovery would be limited to 300 days.

John Paul Stevens

In my hypothetical it would be limited to 300 days.

Austin C. Schlick

Yes, Justice Stevens.

The fact that it was continuing would not... would not affect the application of a

300-day period.

Sandra Day O'Connor

In a nutshell, where do you think the Ninth Circuit went wrong, which I take it you believe is the case here?

Austin C. Schlick

Yes, Justice O'Connor.

There were two categories of claims at issue in this case.

The first is what Ninth Circuit referred to as serial violations, that is, independently actionable alleged violations of title VII.

And as to... as to those claims, the Ninth Circuit went wrong in holding that violations that occurred... that accrued more than 300 days before the... the charge was filed were actionable.

The second claim was a hostile work environment claim.

Now, the allegation of the complaint and the claims at trial were that the hostile work environment became actionable right from the outset of Mr. Morgan's employment with... with Amtrak.

It was actionable throughout the period.

Mr. Morgan, however, didn't bring a charge on that... on that claim until years later.

Accordingly, he could only recover for 300 days of the alleged maintenance of the hostile work environment.

Now, our construction--

Stephen G. Breyer

On your theory then, the... the only thing that the continuing violation concept gives, in effect, is a right to use evidence of something that happened prior to the period.

It does not, in effect, give any right to damages for the... whatever the damage is for the hostility prior to the 300-day period.

So, you turned it into an evidentiary rule, it seems to me.

Austin C. Schlick

--No.

Although evidence says that events outside the limitations period are admissible as background evidence, our view of the continuing violation doctrine is that it allows a plaintiff to sue notwithstanding that there may have been notice of... of similar violations outside the limitations period.

And that's the application of the continuing violation doctrine--

Stephen G. Breyer

Oh.

So, you're saying if there has been no... let's... let's assume a case in which there is no independent notice of the hostile environment within the 300-day period.

They would still be able to sue on a continuing violation theory.

Whereas, if it were a purely evidentiary rule, they would not be able to sue within that period.

Austin C. Schlick

--Suit... suit could be brought within 300 days for the entirety provided that it accrued within the 300 days.

And the... the relevance of the continuing violation rule is that notice outside the limitations period... in this case going back to the serial claims, in this case notice of related violations outside the limitations period do not prevent Mr. Morgan for suing on violations that occurred within the limitations period.

Antonin Scalia

Let's... let's assume you have a hostile work environment that goes on for 900 days.

He doesn't bring an action until the last 300 days or until day 601.

What... what you're saying, I believe... and correct me if I'm wrong... is that the mere fact that the hostile work environment really commenced 600 days ago does... or 900 days ago does not bar you from getting damages for the last 300 days.

Austin C. Schlick

That's right, Justice Scalia.

When you say commenced, I understand you to mean accrued.

It became actionable.

Antonin Scalia

It became... it became a hostile work environment--

Austin C. Schlick

Yes.

Antonin Scalia

--900 days ago.

Austin C. Schlick

That's correct, Justice Scalia.

Antonin Scalia

But it continued to be a... a hostile work for all 900 days.

You can sue for the last 300 days--

Austin C. Schlick

That's correct, Justice Scalia.

Antonin Scalia

--even though it's--

Stephen G. Breyer

--And you also think he can... don't you think he can get damages for the whole 900 days if a reasonable person wouldn't have realized that those first 600 days were actionable?

Austin C. Schlick

That, Justice Breyer, is the question of accrual under Harris.

The... the standard for the claim in that case would be whether the work environment... the... was severe and pervasive both objectively and subjectively.

Stephen G. Breyer

All right.

Now, if you... if you... what about just modifying it a little to try to give meaning to the 2 years of back pay that you could get and all the other things and realities of the work place, and say, as long as it was reasonable for him not to go to the EEOC, he can recover for the whole 900 days?

And there are a lot of reasons it's reasonable not to go to the EEOC.

Maybe because you didn't quite understand what was going on.

Maybe you thought it would cure itself.

Maybe you thought those were just comments that some guy made.

He should be better educated.

Maybe you thought the employer will work it out.

Maybe you thought your supervisor wasn't the rat he turned out to be.

All right, or whatever.

You see what I'm saying?

As long as a judge would say it was reasonable, what about that?

Austin C. Schlick

The... the reasonableness that would allow... that would extend the limitations period is... is reasonableness that would qualify under the equitable tolling or equitable estoppel doctrines.

And indeed, the limitations period is sometimes extended even beyond 2 years, thereby giving effect to the 2-year restriction on back pay under the equitable tolling doctrine.

William H. Rehnquist

Well, there... there are a lot of reasons for not going to court too, but we've never said those toll the statute of limitations.

Austin C. Schlick

That's correct, and if it's a reason which does not--

Sandra Day O'Connor

Do you think the Seventh Circuit has adopted the right test in that regard?

Austin C. Schlick

--The result of the Seventh Circuit's test is generally consistent with our rule, but the... the Seventh Circuit's test is in our view less definite than our own.

They seem to ask whether the plaintiff sued at an appropriate time.

Our question is, did the plaintiff bring suit within... or file a charge, rather, within 300 days or 180 days, if applicable, of the accrual of the violation, of the occurrence of the alleged unlawful employment practice.

And that is the rule established in the NLRA, which is the model for title VII.

Ruth Bader Ginsburg

But the agency here... I mean, that's... the position that you are taking, on behalf of the United States, differs from the EEOC's position which, I understand it, is the position that the Ninth Circuit followed.

Austin C. Schlick

Yes, Justice Ginsburg.

The respondent and amici rely on regulations issued by the EEOC under section 717 of the act, which is the Federal employer provision.

Those regulations are by their terms inapplicable to claims under 706, and indeed, Congress left it to the EEOC to establish a... a framework for... for filing charges that the EEOC requires consultation within 45 days with the agency's EEO office.

So, it's a different structure, and in that context--

Ruth Bader Ginsburg

Well, what is the EEOC's position on... on this case?

Austin C. Schlick

--In section 706 cases, respondent correctly points out that the EEOC has filed briefs and taken a position which is consistent with the Ninth Circuit's test.

Our view is that while that would be evaluated under Skidmore, it is not persuasive for the views that we've given in our brief.

Ruth Bader Ginsburg

And your answer to the question about the 2 years is that there are cases.

There wouldn't be very many, though, that would fit where would be a 2-year... possibility of a 2-year back pay.

Austin C. Schlick

I can give you two cases from the Southern District of New York last year, Sye v. The Rockefeller University, 137 F. Supp. 2d 276; Bardniak v. Cushman and Wakefield, 2001 WL 1505501, both last year.

In both of those cases, the charge was filed 3 years after the last occurrence that's alleged and applying equitable tolling principles, the courts indicated that the... that the complaint could go forward because of the equitable tolling.

Ruth Bader Ginsburg

And you agree with those equitable... whatever those equitable tolling reasons were?

You think those courts handled the case correctly?

Austin C. Schlick

Yes.

I think so.

In both cases, misinformation was provided by the agency, either the State agency or the EEOC itself.

In one case there was a question of mental... mental incapacity of the plaintiff, and tolling was additionally extended on that basis.

Stephen G. Breyer

I'm not sure I understand why hostile environment cases are unique.

Why is that the only kind of continuing violation?

I mean, if I'm not giving... given a promotion that I was entitled to because of my race, I continue not to have that promotion month after month after month.

Why isn't that as much of a continuing violation as is a hostile work environment?

Austin C. Schlick

In our view hostile environment cases are not unique and are not properly exceptions in which... in which a continuing violation doctrine apply.

Rather it's a question of accrual, and hostile environment cases are distinguishable in that they may take a long time to accrue.

But that simply means that when they do accrue, the charge should be brought within 300 days.

The example of... of a discharge would be--

Stephen G. Breyer

But I thought you said the opposite.

If... if it accrues now, I can still sue 900... 900 days later for the hostile work environment of the last 300 days.

I thought that's what you said.

Austin C. Schlick

--If I may answer, Mr. Chief Justice.

William H. Rehnquist

Yes.

Austin C. Schlick

In that case there is an occurrence within the 300 days and it's that occurrence that is the basis for the charge and the complaint within the 300 days.

William H. Rehnquist

Thank you, Mr. Schlick.

Ms. Price, we'll hear from you.

Pamela Y. Price

Mr. Chief Justice, and may it please the Court: Ongoing violations of the law must be treated differently from discrete acts.

A continuing unlawful practice which involves a present violation of the act means that the claim is not stale.

Limiting liability to 180 days solely would essentially nullify section 706(g).

It would allow the defendant in this case Amtrak... would essentially negate the language of title VII which speaks in terms of practices.

It speaks specifically to an unlawful employment practice.

Antonin Scalia

Well, I mean, the claim is not stale, of course, as to the continuing acts.

The question is can you go back for the acts as... as to which the statute arguably has run.

Pamela Y. Price

This is true.

Antonin Scalia

And... and so the... the question is not whether or not you can sue continuing acts.

If it's indeed a continuing act, you can sue for the acts that are within the... the

period.

The question is can you go back.

Pamela Y. Price

Yes, Your Honor.

And it is true that we believe that you can go back.

With respect to back pay, Congress has specifically provided under 706(g) that you can go back 2 years for back pay liability.

With... and there is a difference between a liability for damages and liability for essentially liability's sake.

Under the statute, under title VII, Congress did not put a limit in as to how far you could go back.

It said you must file the charge within 300 days for purposes of initiating the conciliatory involvement of the EEOC.

But filing the charge while, you said in Zipes, it's like a statute of limitations, it does not dictate how far you go back in terms of establishing the employer's liability.

You said in Havens that where you have a continuing practice of discrimination, that it is appropriate to allow the plaintiff to recover for the entire practice and--

William H. Rehnquist

But Havens was a different statute, was it not?

Pamela Y. Price

--It is a... it is... yes, sir.

It was a different statute but it has the same language and it has the same purpose.

It was a statute intended to outlaw discrimination, and it is supposed to be interpreted with the same understanding, one, that it's a statute that's going to be utilized by lay persons, and two, that it has a broad remedial intent.

William H. Rehnquist

Well, have we ever set aside this type of statute and said we give all possible breaks to plaintiffs on it?

I don't believe we have.

Pamela Y. Price

No.

I don't believe you have.

And I think what you said in Zipes, Mr. Chief Justice, was that it was necessary to strike a balance to allow for the prompt filing for... to give notice to allow the EEOC to give notice to the employer and to be sure to effectuate the remedial intent of the statute.

So, there was a balance struck.

If you date the trigger period for the statute of limitations from the date that the person either knew or reasonably should have known, you disrupt that balance because then you're moving the trigger from the last occurrence of the practice to an uncertain time when the plaintiff either reasonably should have known or unreasonably should have known.

Sandra Day O'Connor

Ms. Price, the Ninth Circuit, whose judgment we're reviewing here, as nearly as I can tell seems to take a different view of what can be included for damages as actionable than that taken by other circuits that have looked at the same statute and the same problem.

Pamela Y. Price

It is... yes, ma'am.

Sandra Day O'Connor

Would you agree with that?

Pamela Y. Price

Yes, ma'am.

I would agree that it has taken a... that there is a split in the circuits.

I believe--

Sandra Day O'Connor

Yes, a very lopsided split really.

Pamela Y. Price

--Well, I think the Ninth Circuit's position is actually in the majority view.

David H. Souter

It's a big circuit.

Right?

Pamela Y. Price

Yes. [Laughter]

Yes, but none of the circuits disagree about what constitutes a continuing violation.

Where the disagreement is is in... similar in this case.

There's a disagreement between us and Amtrak as to when the trigger for the practice... for the charge-filing requirement occurs.

There's a disagreement as... with... between us and the Government as to what is covered in that 300-day period.

Sandra Day O'Connor

Well, if there are separate events that have occurred and if each one standing alone would be actionable and if no charge is filed or suit brought until after the time limit established for some of the violations, what do we do?

Pamela Y. Price

Well, you look, as the circuits have uniformly looked, as to whether or not it is a practice or a continuing violation.

You... it's... you... if you look at the case as a series of discrete acts, then yes, we lose.

But it's not a case where there's a series of discrete acts, and in fact, the majority of the issues that Mr. Morgan was addressing were not actionable in and of themselves.

The initiation of disciplinary action--

Sandra Day O'Connor

Do you think the acts that occurred before the applicable statutory period had expired were actionable?

Pamela Y. Price

--I... no, I don't.

I think that there were some that, if they had occurred in isolation, could have been actionable.

When we presented the case, we did not pursue this case as one for a violation, for example, of the... his termination and then ultimate suspension in 1991.

We did--

William H. Rehnquist

But if you... if you say that an event, if it occurred in isolation, would be actionable, you are saying then that it was actionable by itself without combining it with anything else.

Pamela Y. Price

--Yes, sir, I am saying that.

It is true that if that is... the difference between a discrete act and a continuing practice of discrimination.

Stephen G. Breyer

Well, what do you mean by a continuing... let... let's... let's take the failure to give a person a promotion because of her sex or his race or whatever.

Let's assume that that occurs and then... and then the claim is made 2 years later.

During that whole 2 years, the person hasn't gotten the promotion.

And is it your position that... that when it is finally filed 2 years later, you can get back pay or damages for the whole 2 years, even though, you know, you had the claim 2 years ago.

Pamela Y. Price

Well, a promotion, as I understand the law, is a distinct area, and there are some circumstances where the courts have held that a promotion would result in extending the time for one to recover damages.

There are other situations where we want to distinguish between a promotion that simply involves the continuing effects.

We're not talking about, as... as the Court is well aware, a promotion in this case or a situation where it's simply Mr. Morgan is suffering the continuing effects of a prior decision.

We're talking about a continuing series of acts that continued up until the charge-filing period that were motivated by retaliation and discrimination.

We're talking about a hostile environment claim, and the Court should be clear there was a question as to whether or not this case involved a hostile environment.

We brought that to the trial court's attention, and on October 22nd, 1998, she issued a specific order ruling--

Stephen G. Breyer

Well, I... I don't... I'm not sure what your answer is to my hypothetical, and... and I asked the hypothetical because frankly I don't see how a hostile environment claim is any different from a failure to promote claim.

That failure to promote continues.

The... the loss of salary continues right over the 2 years, just as a hostile environment claim continues over 2 years.

Pamela Y. Price

--This Court has defined a hostile environment as the... the actionable part of it is the environment itself.

It's not the discrete acts.

In the Justice's hypothetical, I believe that you're focusing on the discrete act of a failure to promote that individual, which is... has a definite beginning, end.

It's right there.

It happens.

In a hostile environment, it's not so simple.

Hostile environment... you can have an act that might not be actionable, but when you... when you look at it over a period of time, a series of acts, that it's cumulative and the harm is indivisible.

In a promotion case, the harm is related solely to the failure to promote.

In a hostile environment case, you can't separate the harm that's caused on day 899 from the harm that's caused on day 200.

John Paul Stevens

What you're saying, if I understand it correct, is the promotion is a discrete violation with continuing effects, whereas a hostile environment is a continuing violation.

Pamela Y. Price

Yes.

Yes, Justice Stevens.

John Paul Stevens

Which is two quite different things.

Pamela Y. Price

Yes, sir.

Stephen G. Breyer

Suppose you have a continuing--

John Paul Stevens

--Is this case--

Stephen G. Breyer

--Suppose you have a continuing violation, a hostile environment, made up of many minor acts.

Pamela Y. Price

Yes, sir.

Stephen G. Breyer

And it goes on for many, many years.

And the... the injured individual finally goes to the EEOC after a very long time.

In your opinion, can he recover damages then back for the entire 10 years or 15 years, or is there some cutoff point behind which you won't get the damages?

Pamela Y. Price

The ability to recover damages in that circumstances depends on a number of factors.

First would be the plaintiff's ability to establish that it is in fact a continuing violation that--

Stephen G. Breyer

Well, he does.

Let's assume he does.

Pamela Y. Price

--Then his ability would be affected by this Court's decisions in both Faragher and Burlington Industries where this Court said that if there's no tangible employment action and the employer can show that it has taken appropriate steps to prevent or remedy discrimination, and the plaintiff--

Stephen G. Breyer

No, they didn't.

Pamela Y. Price

--Okay. [Laughter]

Well, if they can't show that the victim unreasonably failed to take advantage of whatever remedies or opportunities were... were not available or should have been available, then yes, the plaintiff would--

Stephen G. Breyer

I just wonder.

You see, if at some point we might say, well, he should have gone to the EEOC.

It was unreasonable of him not to.

I wouldn't say he had to do it immediately, but after many years?

And... and do we want to give him damages all the way back?

Pamela Y. Price

--The damages question again is a separate question from liability.

The damages are going to be limited by 706(g) which provides a 2-year cap on back pay and by the caps that Congress has enacted for compensatory damages.

For instance, if... if his employer was, you know, within that $50,000 range, he's only going to get $50,000.

Ruth Bader Ginsburg

But would you--

Stephen G. Breyer

--Why is it that if there's a continuing violation, say, for 900 days and you file on the 900th day, that you can go back for the first 600 days?

Why?

Pamela Y. Price

Because the statute must have the ability to reach practices.

Where you have a longstanding pattern or practice of retaliation or discrimination, this statute in particular is designed to get at that.

Antonin Scalia

It does reach it.

The only question is, you know, how many damages you get, whether you... you have to be prompt and bring your action soon enough to put an end to it.

I mean, it's not a question of whether you can reach the pattern or practice.

You certainly can.

Pamela Y. Price

Well, but if you limit the period for which you can reach it to only 300 days, you're essentially immunizing the employer who has engaged in a longstanding--

Antonin Scalia

No, you're not.

You're... you're telling the person who's been harmed, you know, if you're harmed, take action right away--

Pamela Y. Price

--Well--

Antonin Scalia

--which is the whole purpose of statutes of limitations.

Pamela Y. Price

--You're telling the person not simply to take action, Justice Scalia, but to take action that it may in fact result in greater retaliation or a loss of employment.

You're not telling them simply to go to the employer--

Antonin Scalia

Well, but that's... but that's always true.

William H. Rehnquist

Retaliation is a separate claim.

Stephen G. Breyer

I... I thought your answer might be that it's difficult to know that there's a pervasive environment until you look at a whole context of acts.

I'm not sure that would be a conclusive... but at least that's a reason.

But when you say, well, it's necessary in order to enforce the act, that... that just begs the question.

Pamela Y. Price

--Well, I think that there are cases where it's difficult to know.

There are also cases where people--

Stephen G. Breyer

All right.

That's one reason.

Suppose... suppose that we play with the hypothetical and we establish that it wasn't difficult to know.

Is there any other reason for allowing us... for requiring the courts to go back?

Pamela Y. Price

--It's not that... well, it's because it's fundamentally a continuing violation of the statute, and the statute itself allows for you to deal with practices.

Number two, you have the 706(g) statute which allows the court to... or allows a... entitles a victim of discrimination to recover damages for a 2-year period, for back pay.

Ruth Bader Ginsburg

And you say that for compensatory damages you rely on the lid in dollar amount.

Pamela Y. Price

Yes.

Ruth Bader Ginsburg

For back pay time.

But I take it your argument would be no different if there were no ceiling on the amount you could get for compensatory or punitive damages.

Pamela Y. Price

That is correct, and the reason why is because Congress looked at this problem.

They looked at this problem in 1972.

They looked at the problem again in 1991.

Congress did not set an anterior limit on liability under title VII, and where Congress has not acted to do that, it is not appropriate for the Court to set that limit.

Stephen G. Breyer

Ms. Price, I don't understand the rationale for treating continuing violations differently in so far as how far you can go back to get damages.

Pamela Y. Price

I can understand why you should treat them differently for purposes of determining whether you can bring suit at all.

That is, if it's a continuing violation, the mere fact that you didn't bring suit within

300 days after the violation started doesn't matter.

You can... you can bring suit at any point during the continuing violation.

But it's a separate question whether, once you do bring suit, you can get damages all the way back to the beginning of it or rather damages just back 300 days.

I see no... no reason conceptually why you should have... you should be able to go all the way back.

Take a failure to promote, which we discussed before, which you say is a one-shot violation, not a continuing violation.

Okay?

Yes, Your Honor.

Stephen G. Breyer

You... you can't bring suit for that if you don't sue within 300 days.

Suppose it's not a failure to promote.

It is simply a failure to pay the salary that this person in... in the job the person has is entitled to, and that's a continuing violation.

Pamela Y. Price

Yes.

Stephen G. Breyer

It continues on and on.

And you're saying that even though that's been continuing on and on for 2 years and the... the employee doesn't take any action, he can go all the way back for the whole 2 years instead of just back for the last 30 days... last 300 days.

I... I don't see conceptually why that ought to be the case.

Pamela Y. Price

706(g) determines how far one can go for back damages.

If the concern is one with respect to liability, the difference... conceptually there

may not be a difference.

But in fact in the... in Bazemore, this Court addressed that particular scenario, and in that particular scenario, the Court said every time the person receives a... a check that's less, then that constitutes a violation.

I mean, it's conceivable under your... under the Court's hypothetical that the employee could file a charge for each one of those paychecks, and I think that that sort of turns Congress'--

Stephen G. Breyer

You're saying it's not a continuing violation.

Pamela Y. Price

--Right.

I mean, and that... that upsets I believe what Congress really intended to do.

That would essentially eliminate the caps entirely.

And we have that potential problem in this case.

If you look at this case as a series of discrete acts, you require Mr. Morgan to file a charge every time he's charged with a rule L violation or every time they threaten to charge him or every time they suggest that he shouldn't have been... that he was 2 minutes late for work.

Those kinds of things in and of themselves should not become the basis for title VII charges.

You have to allow for the circumstance where the employee is in fact being subjected to a... a persistent and a continuing pattern of discrimination that becomes actionable within the 300-day or the 180-day charge-filing period.

Sandra Day O'Connor

Well, should we look to what a reasonable person should be expected to recognize as a cause of action?

Pamela Y. Price

No.

I think no, Justice O'Connor.

Sandra Day O'Connor

There shouldn't be any objective test element in it?

Pamela Y. Price

I think that it's appropriate to look at this continuing violation circumstance in the same way in which the Court has looked at the hostile environment claim.

And in the hostile environment claim, the Court has imposed both an objective test and a subjective test to determine whether or not there is a hostile environment.

That's in the definition of the cause of action.

In this case, the definition of the cause of action is already found within title VII.

Title VII defines what practices violate the act.

With respect to the timing, title VII doesn't say... there's nowhere in title VII where it says that you... the charge-filing is triggered where the person knows or should have known.

There is no notice requirement in title VII.

Title VII ties the requirement that you file a charge from the last date... the last occurrence of the unlawful practice.

That's what the statute says, and I think that's what the Court has to impose on employers.

That is the certainty that employers are entitled to.

It's in the language.

Ruth Bader Ginsburg

But it's not certain because if it is a truly continuing violation... every promotion, every... every training I ask for is going to be denied... it will never end.

It's going on.

At some point there's going to be a suit.

So, the last act is just the last act that happens before the employee decided to

bring the suit.

The very nature of the continuing thing, it's going to go on.

Hopefully the... the charge will stop it.

But it's... the last act is the one that the complainant would pick.

Right?

Pamela Y. Price

Yes, Your Honor.

Ruth Bader Ginsburg

I think your basic position is these filing periods are like a statute of limitations in some respects but not in other respects.

Pamela Y. Price

This is true, and I believe that's why there is that language in Zipes.

It is true that there have been times when it's been referred to as... as a statute of limitations, but in Zipes where the Court looked at it and when you look at the actual purpose of it in Occidental Life Insurance Company v. EEOC, again the Court looked at the purpose of the charge-filing requirement is not to determine liability.

It's to start the administrative process.

That's really all it does.

There's other statutes of limitations or things that are like a statute of limitations.

You have the 90-day period in which one has to bring a lawsuit after you receive the right to sue.

That again is another limitations period.

Ruth Bader Ginsburg

Or the 45 days that you have if you're a Government employee to start consulting in your own house.

Pamela Y. Price

Exactly.

This is not your traditional statute of limitations that defines the period of time for which liability may be imposed.

Ruth Bader Ginsburg

One of... one of the peculiarities is the difference between 180-day and 300 which makes very good sense as far as administrative exhaustion is concerned.

Pamela Y. Price

Yes.

Ruth Bader Ginsburg

But as... why should the person who's in a deferral state get 300 days while the person who's not get only 180 days if we're talking about a statute of limitations as measuring the ripeness or staleness of a claim?

Pamela Y. Price

Yes, that is true.

Congress understood that this statute could be utilized with change depending on where one lived, depending on what sector of the employment arena one is found in.

So, it's not appropriate to rely upon this particular statute as determining the period of liability.

You must look to 706(g) and you must look to the caps where Congress specifically tried to address the concerns of employers.

Viewing this case solely as a... as a series of discrete acts ignores the fundamental problem that Mr. Morgan faced at Amtrak.

Mr. Morgan thought that the... the practices the he was being subjected to were only being perpetuated by a few managers.

What he discovered, when he complained... and you must acknowledge that he did complain.

This is not a situation where the person sat on his rights, as Amtrak would portray him.

Mr. Morgan did complain, and then he discovered that Amtrak absolutely refused to address those practices that were going on in the Oakland yard.

William H. Rehnquist

But if... he complained in October 1991 to the EEOC, didn't he?

And if he discovered then what was going on, shouldn't the statute at least have started running then?

Pamela Y. Price

Well, there's no indication that he discovered... he knew that there were racist practices going on at the yard.

He complained to Congresswoman Barbara Boxer and he complained to the EEOC with the anticipation that there would be some action taken.

In fact, in 1992 Inspector Wiederholt did come out at the insistence of Congresswoman Boxer and looked at that situation.

But that was a process that took over 10 months.

Subsequently when he did complain again in 1993, Amtrak took 9 months to investigate.

To require him to... to go to EEOC within a 6-month or a 10-month window essentially negates his ability--

William H. Rehnquist

But he did go to EEOC.

Pamela Y. Price

--He went to EEOC, yes, when they indicated that they intended to fire him, and that would result in the absolute termination of his relationship with Amtrak.

Ruth Bader Ginsburg

There's some confusion in the... you are referring not to the EEOC charge that

didn't come to till the end of the line, but the EEO charges that he filed in-house.

Pamela Y. Price

Yes.

Ruth Bader Ginsburg

And that's what you're saying he did earlier.

Pamela Y. Price

Yes.

Yes, throughout that process.

Yes, Mr. Chief Justice, he went to Amtrak's EEO.

He filed eight separate charges with them, and they only responded--

William H. Rehnquist

When... when was the first time he filed a complaint with the EEOC?

Pamela Y. Price

--It was in February of 1995.

Antonin Scalia

You know, 300 days is... it's almost a year.

The same thing happens in... in statutes of... of limitations, some of which are 2 years, some of which are as short as 1 year.

The... the person who's thinking of bringing a lawsuit is put to the choice of either negotiating with the person and trying to work it out, but at some point, if he knows there's a 1-year statute of limitations, he's just going to have to say, I'm sorry, I'm going to go ahead.

And I don't know how this 300-day period is any different from that.

It's fine to say you should be able to, you know, waltz around and talk to the

employer and talk to, you know, Barbara Boxer or whatever else, but at some point the... the curtain comes down and you know that's 300 days.

That's the standard operation of a statute of limitations.

Pamela Y. Price

In this case, Mr.... Justice Scalia, the... as I pointed out, the... the statute of limitations operates somewhat differently.

It's like a statute of limitations.

More to the point, however, in this case, as in the cases that are addressed by title VII, you're talking about an employment relationship, an ongoing relationship where the evidence that is... we've presented in our amicus briefs is that the person wants to maintain their employment, and there is a very real fear that if you go outside the scope of your employment to an outside agency, that's going to tear apart the employment relationship.

That... that is essentially crossing the river, and you can't go back from that.

And so, it's very important to allow people an opportunity, and that's the... the focus of the statute was to allow the EEOC not to come in and file a lawsuit, but to come in and conciliate, to try to resolve the problem without the necessity of a lawsuit.

So, you don't want to adopt a strict interpretation or a hard and fast rule that says you've got to file a lawsuit or you've got to start this process within 10 months.

That is not... that doesn't give the employer nor the employee an opportunity to try to resolve matters internally.

Ruth Bader Ginsburg

For some it's 300 days, for some it's 180.

How many States are so-called deferral States where people would get the benefit of the 300 days rather than the 180?

Pamela Y. Price

I regret, Justice Ginsburg, I'm not... I don't know how many.

Ruth Bader Ginsburg

Because that would be a very odd statute of limitations to say, depending on your... the State that you're in, you get 180 days or 300 days.

Pamela Y. Price

This is true.

And again, it's interpreted.

It has to be interpreted because it applies in other areas of the law, and it does define... it really defines the point at which you have to try to get an outside agency to come in.

It doesn't define the point at which you have to sue, and it doesn't define the point that limits your damages.

That is what is critical.

Congress has defined the... the point of damages.

Congress has not defined the point of liability.

Ruth Bader Ginsburg

But Mr. Englert said that the limitation, the 2-year limitation... that's because Congress was reacting to a time when there was no limitation and there were fears that you'd have to go all the way back to 1965.

So, they set 2 years.

If they had understood properly what was going to be the effect of 180 days, which wasn't determined till much later, then they would have realized that there was... they fixed something that... where there was nothing broken.

Pamela Y. Price

Congress had an opportunity.

The problem with Mr. Englert's view of it is that Congress had another opportunity after this Court's decision in Zipes in 1991, and Congress did not change either 706(g) and it didn't change 706(e).

It did address the very concern that employers were raising, that we're going to be subjected to unlimited damages where you... if you allow compensatory damages, and Congress put in the caps.

Congress addressed this problem in a different way by putting in temporal... excuse me... nontemporal limits, by putting in a monetary limit.

Congress could have put in a temporal limit, and it did not.

It could have taken out 706(g), and it did not.

So, to suggest that that section is... is a superfluous section that only addresses some long past effect of title VII or a doctrine that is no longer a part of title VII is inaccurate.

David H. Souter

Well, 706(g) would still apply to a continuing violation, wouldn't it?

I mean, if there's a continuing violation, you think it wouldn't apply to that at all.

Maybe not.

You don't think 706(g) has any application under... under the petitioner's theory.

Pamela Y. Price

Not under the petitioner's theory, no.

I think that they're reading 706(g) out of the statute, which this Court should not do.

Ultimately in hostile environment cases, the sexual harassment victim... if you impose this requirement, the sexual harassment victim, in particular, runs the risk of being... of filing either too early or filing too late.

Again, in Love v. Pullman, this Court recognized that this process is one that is initiated and utilized by lay persons unassisted by trained lawyers.

You should not impose a requirement upon a lay person to determine, oh, now... when this continuing violation doctrine is going to start and when my damages are going to start accruing.

And therefore, now I must file with the EEOC.

They are... the last act which is what Congress contemplated is what has to be the trigger for the statute.

Ruth Bader Ginsburg

But you recognize that you can't turn every discrete act into a continuing violation.

I mean, it must be used.

You have conceded that the one-time thing... you're not getting this promotion, you're discharged.

How does one tell... and here... here there were several similar acts... whether it's a discrete violation on the one hand or whether it's a continuing violation?

Pamela Y. Price

I think that the courts have not... have been able to determine where there's a discrete act, and there's nothing happens.

And this is really where this Court has set the outer limit.

The... it requires a present violation.

It is sometimes difficult to determine what's a discrete act and what is a part of a pattern.

William H. Rehnquist

Thank you, Ms. Price.

Mr. Englert, you have 3 minutes remaining.

Roy T. Englert, Jr.

Thank you, Mr. Chief Justice.

Justice O'Connor, in one of her questions for Ms. Price, referred to the very lopsided split in the circuits, and I agree that there's a very lopsided split contrary to the Ninth Circuit's view.

Only one of those many circuit cases that I'm aware of... at least the recent circuit cases... actually discusses the 706(g) issue that's taken up much of the argument time today, and that is the First Circuit's opinion in Sabree, which actually comes out squarely where we come out in this case, that in general damages are cut off at 300 days.

There is an exception, the details of which it's probably better not to spend any

more time on.

But we agree with the Sabree result.

Under no circumstances does our view render section 706(g) superfluous.

I do think it's something of an anachronism enacted to deal with problems that went away, but under no circumstances is it superfluous.

In cases of equitable tolling, in government suits against municipalities under section 707 where there is no statute of limitations, in the kinds of hostile environment cases we were discussing earlier, the 2-year back pay cap can have effect.

Let me mention very briefly, although not much time was spent on it earlier, the Havens case was decided under a different statute.

In the Lorance case, the Solicitor General urged the Court to follow Havens.

The Court said no.

The Court didn't address Havens in its opinion.

It said... but it said... did say in its opinion the more relevant precedents are the NLRA precedents, which squarely support the position we're taking here today.

Because--

Ruth Bader Ginsburg

What's the difference between your position and the Government's?

Roy T. Englert, Jr.

--Very little, if any, Your Honor.

I think they might concede less than I was conceding earlier, but other than that, I think there's very little difference.

And the Government, quite importantly, in its brief says what the continuing violation doctrine is, and what the continuing violation doctrine is in all other areas of law besides title VII is essentially what some of Justice Scalia's questions were suggesting, which is you're not out of court entirely just because you didn't bring suit within 300 days of the first incident or 4 years in the case of the Clayton Act.

You do get to bring suit, but you only get damages reaching back to the

limitations period.

Let me mention very quickly.

Amtrak did win this case at trial.

So, I don't want the Court to have the impression that it's conceded that there was racial discrimination going on, but I'll leave it at that.

And finally, just a detail.

43 States and the District of Columbia more or less are deferral States.

That's the figure the Government has given me, and I'm... I'm certain it's more than 40 States are deferral States.

Ruth Bader Ginsburg

Could you explain the logic in statute of limitations terms between giving some people 300 and others 180?

Roy T. Englert, Jr.

The only logic is that that's what Congress said.

If it's a single incident case and you file on the 181st day, you're out of court if you're not in a deferral State.

William H. Rehnquist

Thank you, Mr. Englert.

The case is submitted.